APPENDIX
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APPENDIX I
OPINION OF THE COURT OF APPEAL

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR
(Filed November 29, 1995)

Pamela N., Plaintiff and Respondent, v.
Stephen M., Defendant and Appellant.
A066566 (Marin County Super. Ct. No. 4271)

In June 1992, the marriage of appellant Stephen M. and respondent Pamela N. was annulled. In September 1993, Stephen moved to terminate child support. The trial court denied the motion. Stephen appeals, contending that (1) his legal obligation to support his biological child is vitiated by Pamela's fraud in inducing conception and (2) her conduct divested him of his constitutional right of reproductive choice. We affirm the order.

I. FACTS

In October 1989, appellant Stephen M. and respondent Pamela N. were married. In May 1990, Pamela petitioned to dissolve the seven-month marriage. In December 1990, a son was born.[1] Stephen sought nullification of marriage on the basis of fraud and disputed paternity. He challenged paternity and declared that if blood tests did establish paternity, conception had been obtained by means of Pamela's fraud.

In February 1991, blood tests established that Stephen is the child's biological father. Stephen withdrew his challenge to paternity. However, no order was entered stating the fact of

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[1]To protect the child's privacy, we decline to name him in our opinion.

paternity or that Stephen had withdrawn his challenge to paterniy. Pamela moved for child support. In April 1991, Stephen was ordered to pay $1,400 a month in temporary child support.

In August 1991, Stephen filed a pretrial statement admitting that the child was a child of the marriage. He stated that he had sexual relations with Pamela in March 1990, resulting in the birth. He cited these facts as evidence in support of his request for an annulment, but did not challenge his obligation to support the child. In September 1991, Stephen filed a declaration stating that in March 1990, he and Pamela had sexual relations. He asserts that he ejaculated semen outside her body in response to her fondling, that no vaginal intercourse occurred, but that Pamela wiped his semen into her body. In January 1992, Stephen filed another pretrial statement acknowledging that the child was a child of the marriage and explaining the circumstances of conception. As before, he noted these facts in relation to his request for an annulment, but did not contest his support obligation.

Meanwhile, in May 1991, Pamela sought a protective order restricting Stephen's discovery regarding birth control, any agreements not to have children, and her alleged fraud in becoming pregnant. In January 1992, the trial court issued its notice of intended decision granting a protective order. In its decision, the court held that it is no defense to child support that the child was unwanted. Stephen moved for reconsideration, without success.

In March 1992, Stephen filed a settled statement of issues again acknowledging that his son was a child of the marriage. He agreed that child support should be awarded in the discretion of the court, but stated that he reserved the right to challenge Pamela's entitlement to child support on the ground of fraud surrounding the child's conception.

In June 1992, the marriage was annulled based on fraud. All issues except permanent child support were resolved at that time, a temporary child support order still being in effect. In

August 1993, Pamela sought to modify the child support order. In September 1993, Stephen was ordered to pay $900 a month to Pamela for child support, $100 a month for medical insurance, and to pay on arrearages owed at a set rate.

In September 1993, Stephen moved to terminate child support on the grounds of fraud—specifically, because Pamela had inseminated herself without his consent, resulting in the birth. Pamela opposed the motion on the ground that the issue had already been litigated, barring any relitigation of the issue under the doctrine of res judicata. She also argued that even if Stephen's alleged facts were accepted as true, as the child's biological father, he was responsible for his support under the law. (See former Civ. Code, § 242 [Stats. 1992, ch. 162, § 2]; now Fam. Code, § 3900.)

After a December 1993 hearing, the trial court denied the motion to terminate child support. For purposes of its ruling, the trial court deemed the facts set forth in Stephen's motion to be true. The court concluded that Stephen was estopped from denying paternity because he participated in the proceedings as if he were the biological father. The court also ruled that Stephen's lack of consent did not relieve him of his child support obligation. The facts alleged in Stephen's motion were held not to affect his duty of support.

II. SUPPORT

Stephen contends that the trial court was incorrect when it ruled that even if his alleged facts were accepted as true, his obligation to support his child remained. We disagree. Under the Uniform Civil Liability for Support Act, a parent has a duty to support his or her child.[2] (Former Civ. Code, § 242 [repealed Stats. 1992, ch. 162, § 2]; now Fam. Code, § 3900.) The statute

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[2]"[T]he father and mother of a minor child have an equal responsibility to support their child in the manner suitable to the child's circumstances." (Fam. Code, § 3900 [operative January 1, 1994].)

states no exception to the applicability of its mandate. Nevertheless, Stephen would have us liken his situation to that of a sperm donor in an artificial insemination case. (See, e.g., Fam. Code, 7613, subd. (b).) We are satisfied that on the facts Stephen has alleged, the child's conception was *not* the result of artificial insemination. There was no third party sperm donor involved in this conception. (Fam. Code, § 7613 [stating respective rights and obligations of sperm donor and husband].) That insemination occurred indirectly during sexual relations other than vaginal intercourse may make it irregular, but it does not render the insemination artificial.

Stephen also argues that his lack of consent to inseminate Pamela invalidates the statutory duty to support his son. However, traditionally, courts have been reluctant to inquire into the circumstances of conception. For example, evaluating a predecessor duty-to-support statute, one court stated that it would reject a father's attempt to sue a mother for wrongful birth based on allegations that the mother made false representations about birth control. The court stated that to allow the assessment of damages in such circumstances "would have the practical effect of reducing or eliminating support from the father by way of offset. Erasing much or all of the father's financial support, to the detriment of the child, is clearly against public policy and the statutory mandate." (See *Barbara A. v. John G.* (1983) 145 Cal.App.3d 369, 379 [dicta; former Civ. Code, § 196a].) Such an inquiry could only be harmful to the child, when he grows old enough to understand its implications. For these reasons—the detriment to the child and the public policy favoring parental support of children—we reject Stephen's claim that lack of consent permits him to avoid his statutory duty to support his son.

III. CONSTITUTIONAL RIGHT

Stephen also contends that he has a constitutionally protected right of reproductive choice in the use of his sperm, sufficient to relieve him of the duty to support a child

conceived by artificial insemination without his consent. As Stephen concedes, this constitutional claim was made in the earlier annulment proceedings, but was not raised in the trial court when he made his motion to terminate child support. The theory on which a case is tried must be adhered to on appeal. To permit an appellant to offer a new theory of the case on appeal would be unjust. (Ernst v. Searle (1933) 218 Cal. 233, 240-241; see 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 316, pp. 327-329.) We will not address this new argument.[3]

The order is affirmed.

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[3]Stephen also challenges the trial court's estoppel ruling. However, as we have determined the merits of this matter, we need not address the estoppel issue.

APPENDIX II
TRIAL COURT'S FINDINGS AND ORDER AFTER HEARING

SUPERIOR COURT OF CALIFORNIA, COUNTY OF MARIN (Filed May 25, 1994)

In re the Marriage of:	Case No. FL 4271
Petitioner: PAMELA J. [M]	FINDINGS AND ORDER AFTER HEARING
and	
Respondent: STEPHEN [M]	

Respondent Stephen [M]'s ("Stephen") motion to terminate child support for fraud came on regularly for hearing on December 7, 1993 and December 14, 1993. Stephen appeared in person along with his attorney, William B. Doty. Petitioner Pamela [N] ("Pamela") did not appear but appeared by and through her attorney of record, Ronald Land of the Family Law Center.

At the December 7, 1993 hearing, the parties stipulated that the legal issues presented by Stephen's motions should be first resolved. It was therefore agreed that the matter would be put over to December 14, 1993 in order to determine whether Stephen is entitled to relief assuming that the allegations of his motions are proven to be true.

At the hearing on December 14, 1993, the matter proceeded assuming all facts put forth by Stephen to be true. Counsel for both parties were given an opportunity to argue the matter and it was submitted on that basis.

The court makes the following findings:

1. For purposes of this ruling, the facts set forth above and in Stephen's motion are deemed to be true.

2. At the commencement of the action, Stephen challenged parentage and blood tests were conducted.

3. The blood tests showed that Stephen was the biological father of the child.

4. No order of paternity has even been issued in this case nor has there been any determination on the issue of permanent child support.

5. Stephen is estopped from denying his parentage. Stephen participated in the proceedings as if he was the biological father.

6. Stephen's lack of consent in the manner alleged in the stipulated facts does not relieve him of the obligation of child support.

7. A judgment was entered for an annulment of the marriage based on fraud, pursuant to the stipulation of the parties. The court reserved jurisdiction on the issue of permanent child support.

8. Looking at all of the circumstances of this case, the court determines that Stephen has a legal obligation to support the child and the facts alleged in his motion do not affect his duty of support.

Based upon the foregoing, the court denies Stephen's motion to terminate child support based on fraud. Each party is to bear their own costs and attorney's fees.

[DATE, SIGNATURE, TITLE OF JUDGE]

APPENDIX III:
Order Denying Rehearing

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIRST APPELLATE DISTRICT

DIVISION: 4

(FILED December 21, 1995)

[N.], PAMELA
vs.
[M.], STEPHEN
(NOTE: PROTECTIVE ORDER IN EFFECT)
A066566
MARIN COUNTY NO. 4271

BY THE COURT:

The petition for rehearing is denied

Dated: DEC 21 1995

ANDERSON, P.J.

APPENDIX IV
REQUEST FOR PUBLICATION

December 18, 1995

Ron D. Barrow, Clerk
Court of Appeal, Div. 4
303 2d St., Ste. 600
San Francisco, CA 94107

Re: Pamela N. v. Stephen M., No. A066566
Request for Publication

Dear Mr. Barrow:

This is to request publication of the court's opinion, filed November 29, 1995, which appears to meet the standards for publication of rule 976(b), in two ways.

First, the court's finding, on page 4 of the opinion, that "insemination occurred indirectly during sexual relations other than vaginal intercourse may make it irregular, but it does not render the insemination artificial[,]" could be said either to establish a new rule of law or apply an existing rule to a set of facts significantly different from those stated in published opinions (rule 976(b)(1)).

Second, as explained in appellant's post-argument supplemental brief and in his petition for rehearing, the court's application of the waiver rule to his constitutional argument (Opinion, pp. 4-5) in a case which only raises a question of law on settled facts is contrary to *Ward* v. *Taggert* (1959) 51 Cal.2d 736, 742 ("it is settled that a change in theory is permitted on appeal when 'a question of law only is presented") and its progeny. As my analysis has shown, the cases over the past twenty years are consistent in this regard, and the court's opinion therefore creates an apparent conflict in the law (rule 976(b)(2)).

Sincerely,

RICHARD I. TARGOW
Attorney at Law

APPENDIX V:
ORDER DENYING REVIEW

First Appellate District, Division Four, No. A066566
S050856

IN THE SUPREME COURT OF CALIFORNIA

PAMELA N., Respondent

v.

TEPHEN [sic] M., Appellant

Petition for review DENIED.

LUCAS, Chief Justice

APPENDIX VI:
EXCERPT FROM CORRECTED OPENING BRIEF TO CALIFORNIA COURT OF APPEAL

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

PAMELA N.,	)	No. A066566
	)	
Petitioner and Respondent,	)	Marin County
	)	Superior Court
	)	No. FL 4271
vs.	)	
	)	
STEPHEN M.,	)	
	)	
Respondent and Appellant.	)	

CORRECTED APPELLANT'S OPENING BRIEF
(filed March 27, 1995)

ARGUMENT

III. STEPHEN HAS A CONSTITUTIONALLY PROTECTED RIGHT OF REPRODUCTIVE CHOICE WHICH INVESTED HIM WITH DECISION-MAKING AUTHORITY OVER THE USE OF HIS SPERM SUFFICIENT TO RELIEVE HIM OF THE DUTY TO SUPPORT A CHILD CONCEIVED BY ARTIFICIAL INSEMINATION WITHOUT HIS CONSENT.

A. STEPHEN HAS A CONSTITUTIONAL RIGHT OF REPRODUCTIVE CHOICE WHICH DERIVES FROM EVOLVING CONCEPTIONS OF PARENTHOOD THAT MAKE A MAN'S PROCREATIVE INTENT THE CONTROLLING FACTOR WHEN CONCEPTION IS ACHIEVED BY MEANS OTHER THAN SEXUAL INTERCOURSE

The constitutional question presented by this appeal is whether a man has a fundamental right of reproductive choice that exempts him from liability for the support of a child conceived as a result of his wife's theft of his semen and her self-insemination under circumstances in which the marriage was expressly conditioned on the wife's agreement not to have children and the husband abstained from sexual intercourse with her during the period in which the child was conceived.[12]

Although the constitutional issue was raised in a somewhat different context earlier in these proceedings,[13] it was not raised

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[12]Insofar as Pamela obtained possession of Stephen's semen by false promises regarding her willingness not to have children and by implicitly misrepresenting her intention in performing fellatio on him when he refused to have genital intercourse, her conduct was criminal. At common law her unlawful taking of Stephen's sperm would have been characterized as larceny by trick (see W. LaFave & A. Scott, *Criminal Law* 85, at 627 (1972 ed.)), and under California Penal Code section 484, her conduct constitutes the consolidated crime of theft (see also California Penal Code 952). For the proposition that semen is a form of "property", see *Hecht* v. Superior *Court* (1993) 16 Cal.App.4th 836, 850 (semen stored in sperm bank held to constitute "property" within meaning of Probate Code section 62).

[13]Prior to granting the annulment, the court issued a protective order preventing Stephen from deposing Pamela regarding their discussion prior to marriage about not intending to have children. Stephen filed a motion for reconsideration, which included a constitutional argument similar to the one presented here. (App. 43-46).

again in the instant motion to terminate child support. Nevertheless, this Court may consider and decide this issue because the constitutional arguments presented do not rely on any change in the facts upon which the appeal is prosecuted. "[I]t is settled that a change in theory is permitted on appeal when a question of law only is presented on the facts appearing in the record . . . ." (*Ward* v. *Taggart* (1959) 51 Cal.2d 736, 742, quoting *Panopulos* v. *Maderis* (1956) 47 Cal.2d 337, 341; accord: *In re Marriage of Winter* (1993) 7 Cal.App.4th 1926, 1933; *American Western Banker* v. *Price Waterhouse* (1993) 12 Cal.App.4th 39, 52; *Richmond* v. *Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 879; *Seeley* v. *Seymour* (1987) 140 Cal.App.3d 844, 856; 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 323, pp. 333-334.)

The Due Process Clause of the Fourteenth Amendment guarantees to men as well as to women the freedom of reproductive choice.[14] Matters of reproductive choice "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." (*Planned Parenthood of Southeastern Pennsylvania* v. *Casey* (1992) 505 U.S. __, [112 S.Ct. 2791, 120 L.Ed.2d 674, 698 (Plurality opinion of O'Connor, Kennedy,

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[14]The Fourteenth Amendment's protection of individual rights shields individuals only from governmental action. (See *Shelley* v. *Kraemer* (1948) 334 U.S. 1, 13 [68 S.Ct. 836, 92 L.Ed. 1161). Although this is a civil lawsuit between private parties, the trial court applied a state statute (former Civil Code §§ 4720, 4721, now Fam. Code §§ 4054-4069) in ordering Stephen to pay child support. When, as here, a litigant challenges the constitutionality of a state statue as applied to him, "state action is obvious, and no formal inquiry into the matter is needed" (L. Tribe, *American Constitutional Law* (2d ed. 1988) § 18-1; see *Shelley* v. *Kraemer, supra,* 334 U.S. at pp. 11-12, [restrictions imposed by "state statute or local ordinance" constitute state action]).

and Souter, JJ.)].)

Constitutional doctrine as to reproductive freedom has developed mainly in the context of women's rights relating to freedom of access to birth control (*Eisenstadt* v. *Baird* (1972) 405 U.S. 438 [92 S.Ct. 1029, 31 L.Ed.2d 349]) and abortion (*Planned Parenthood of Southeastern Pennsylvania* v. *Casey, supra; Roe* v. *Wade* (1993) 410 U.S. 113 [93 S.Ct. 705, 35 L.Ed.2d 147]). There can be no question, however, that the Fourteenth Amendment guarantees to men as well as women freedom of reproductive choice. "If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (*Eisenstadt* v. *Baird, supra,* 405 U.S. at 453 (emphasis in original); see *Carey* v. *Population Services International* (1977) 431 U.S. 678, 68 [97 S.Ct. 2010, 52 L.Ed.2d 675] [recognizing right of access to contraceptives by minors without regard to gender]; *Griswold* v. *Connecticut* (1965) 381 U.S. 479, 481, [85 S.Ct. 1678, 14 L.Ed.2d 510] [right to access to contraceptives by "married *people*"] (emphasis added).) Although the U.S. Supreme Court has considered the issue of a man's freedom of reproductive choice only in the context of access to birth control (see *Eisenstadt* v. *Baird, supra*) and the power of a husband to veto a wife's abortion (see *Planned Parenthood of Southeastern Pennsylvania* v. *Casey, supra* [invalidating spousal notice requirement]; *Planned Parenthood of Missouri* v. *Danforth* (1976) 428 U.S. 52 [96 S.Ct. 2831, 49 L.Ed.2d 788]), state courts have recognized that when, as here, a child has been conceived by means other than sexual intercourse, a man's procreational freedom goes beyond a right of access to birth control.

Within the last two decades, advances in reproductive technology, such as artificial insemination, in-vitro fertilization, and surrogate motherhood, have produced profound changes in the concept of parenthood. With those changes has come a

gradual transformation of the nature and scope of reproductive rights when children are conceived by means other than sexual intercourse. Although the child here was not conceived through methods brought about by the march of scientific progress, the fact that the child was conceived non-coitally means that this court should look for guidance to precedents relating to the new reproductive technologies in general, and artificial insemination — the means used here — in particular.

In *Hecht* v. *Superior Court* (1993) 16 Cal.App.4th 836, a probate case involving the disposition of semen that had been deposited by the decedent in a sperm bank for his own future use, the Second Appellate District recognized that even after his sperm had been discharged from his body, the decedent continued to maintain "an interest, in the nature of ownership, to the extent that he had decision-making authority as to the use of his sperm for [non-coital] reproduction." *(Id.* at p. 850). The court concluded that the woman with whom decedent was living at the time of his death had a right to use decedent's cryogenically-preserved sperm to inseminate herself only if the trier of fact determined that this was the intent of the decedent. A man's sperm is "the seed of life . . . tied to the fundamental liberty of a human being to conceive or not to conceive. This fundamental right must be jealously protected . . . . [T]he fate of the sperm must be decided by the person from whom it is drawn. *Therefore, the sole issue becomes that of intent.*" (*Hecht* v. *Superior Court, supra,* 16 Cal.App.4th at 857 (quoting from French Tribunaux de Grande Instance (1984) *Parapalaix* v. *CECOS*) (emphasis added).)

The Tennessee Supreme Court has declared that a man retains his right of reproductive choice even after the sperm has been joined with an egg by a process of in-vitro fertilization to form a pre-embryo. (*Davis* v. *Davis* (Tenn. 1992) 842 S.W.2d 588.) The court found a continuing right to avoid unwanted parenthood after conception, basing its decision on both Tennessee's constitutional right of privacy and the federal constitutional right of procreative autonomy *(Id.* at pp. 598-

603). Declaring that "an interest in avoiding genetic parenthood can be significant enough to trigger the constitutional protections afforded to all other aspects of parenthood" *(Id.* at p. 603), the court concluded that the husband's desire to destroy the cryogenically-preserved pre-embryos outweighed his wife's right to donate them to a childless couple.

Thus, in cases involving two principal methods of non-coital reproduction, artificial insemination and in-vitro fertilization, courts have looked to the intent of the men from whom the sperm was obtained in defining the scope of their reproductive freedom.

Stephen therefore had a constitutionally protected interest in the disposition and use of his semen, which was not "donated" to Pamela as it would have been had he engaged in sexual intercourse with her rather than oral sex. When a man engages in sexual intercourse with a woman, there is a reasonably foreseeable risk that she will become pregnant so that even in the absence of actual procreative intent, liability for the support of a resulting child is consistent with traditional notions of legal responsibility. (See subsection C, 1, *infra*, at pp. 36-39). Whether characterized as "assumption of the risk," "constructive intent," or "waiver," insemination by sexual intercourse can fairly be treated as a surrender of a man's right to control the disposition of his sperm. No such inference can be drawn from self-insemination by a wife with semen obtained from a husband by an act of oral sex.[15]

As the Court of Appeal recognized in *Hecht* v. *Superior Court, supra,* when semen is introduced into a woman's body by a process of artificial insemination, rather than intercourse,

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. [15]The situation here is therefore distinguishable from those cases involving fraudulently induced conception by genital intercourse. (See authorities cited in II, A, *supra,* at p. 15.)

it is the intent of the man from whom the semen was obtained that ultimately governs the issue of paternity (16 Cal.App.4th at p. 857). Since Stephen did not consent to his wife's self-insemination, he retained a right of reproductive choice which gave him decision-making authority over the disposition of his sperm. That right is sufficient to prevent the state from imposing upon him the duty to support the child conceived as a result of Pamela's self-insemination unless his reproductive freedom is outweighed either by a countervailing procreative right of Pamela's or a superior interest claimed in behalf of the child.

B. INSOFAR AS PAMELA CONCEIVED HER CHILD BY SELF- INSEMINATION WITH SEMEN UNLAWFULLY TAKEN FROM STEPHEN, SHE EXERCISED NO CONSTITUTIONALLY PROTECTED RIGHT OF PROCREATION THAT CAN BE ASSERTED AGAINST STEPHEN'S DENIAL OF RESPONSIBILITY FOR CHILD SUPPORT

The constitutional right to have children and raise a family has been deemed one of the "basic civil rights of man" (*Skinner* v. *Oklahoma ex rel. Williamson* (1942) 316 U.S. 535, 541 [62 S.Ct. 1110, 86 L.Ed.2d 1655]), and "one of the liberties protected by the Due Process Clause of the Fourteenth Amendment" (*Cleveland Board of Education* v. *LaFleur* (1974) 414 U.S. 632, 639-640 [94 S.Ct. 791, 39 L.Ed.2d 52]). The question presented by this appeal involves deciding how to reconcile the conflict between a wife's right to procreate and a husband's equally important right not to procreate.

It is no answer to say, as one court has held, that insofar as the competing claims are based on a right to privacy, the conduct "engaged in by two partners in a consensual sexual relationship is best left to the individuals involved, free from any governmental interference" (*Stephen K.* v. *Roni L.* (1980) 105 Cal.App.3d 640, 645). The fact is that here the Legislature

has intruded itself into intimate matters of sexual conduct, family relationships, and parental obligations by requiring "parents" to support their minor children (Fam. Code § 4050, et seq.), leaving it to the courts to decide when a person is a lawful "parent". Moreover, the Legislature has specifically provided that parents may not make their own consensual arrangements regarding child support unless the agreement is approved by the court (Fam. Code § 4065, subd. (a)) and satisfies other specific statutory requirements *(Id.,* subds. (b), (c)). The imposition of state- mandated child support in this case distinguishes it from *Stephen K.* v. *Roni L.,* supra, where the plaintiff was seeking tort damages from his sexual partner for the birth of a child. The issue of state-ordered child support, as the court noted in *Stephen K.,* was "separate and apart" from the tort action, and "[i]n the posture of the case as presented to [the court], the state ha[d] minimal if any interest in this otherwise entirely private matter." (*Id.* at p. 643.)

While judicial inquiry into a married couple's sex life — matters that are ordinarily considered the couple's private business — should not be undertaken lightly, such inquiries are not only proper, but necessary, when the sexual relationship is alleged to have been grossly abused. Considerations of marital privacy do not constrain a court from judicial inquiry in cases of spousal rape or severed penises or other forms of sexual mistreatment. Pamela's fraudulent sexual conduct constituted such a gross abuse of the marital relationship that, under these circumstances, the court below should not have been constrained by privacy considerations from hearing testimony regarding the alleged fraud.[16]

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[16]Even if the interest protected by the constitutional right of privacy were to be construed as total freedom from governmental interference in any form, the appropriate judicial response would be to leave the parties as it found them. Such an interpretation of the right to privacy would result in a decision in Stephen's favor since it would prohibit a court from intervening to order child support.

The privacy issue, properly stated, is whether Pamela's fraudulent and criminal conduct[17] in obtaining Stephen's sperm so vitiated her right of procreation as to remove the constitutional protection of the Due Process Clause and tip the balance in favor of Stephen's constitutional right not to procreate. For purposes of deciding Stephen's motion to terminate child support, the allegations regarding Pamela's fraudulent conduct were deemed to be true. (App. 109, ¶ 1.) It is well-established that the abuse of rights will result in the loss of the protection otherwise afforded by the Constitution (see *Prince* v. *Massachusetts* (1944) 321 U.S. 158 [64 S.Ct 438, 88 L.Ed. 645] [causing injury to children by using them as religious proselytizers not protected by Free Exercise Clause]; *New York Times* v. *Sullivan* (1964) 376 U.S. 254 [84 S.Ct. 710, 11 L.Ed.2d 686] [defamatory statements made with knowledge of their falsehood not protected by Free Speech Clause]). Surely, the Due Process Clause does not protect an individual's right to procreate by rape (see *Michael H.* v. *Gerald D.* (1989) 491 U.S. 110, 124, fn. 4 [109 S.Ct. 2333, 105 L.Ed.2d 91] or by stealing a semen sample from a sperm bank. Pamela's theft of Stephen's sperm by fraudulent means is no less reprehensible or injurious than breaking and entering a sperm bank and should preclude her from exercising her procreational freedom to impose upon Stephen the financial burden for the child she alone chose to have.

To be sure, a petition for child support is primarily concerned with protecting the welfare of the child, and an innocent child ordinarily should not be denied a financial benefit because of parental fault. (Cf. *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 [92 S.Ct. 1400, 31 L.Ed.2d

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[17]On the criminal nature of Pamela's conduct, see footnote 12, *supra*, at p. 24.

768] ["Penalizing the . . . child is an . . . unjust . . . way of deterring the parent."]). Despite the compelling interest that government has in protecting the welfare of innocent and dependent children, however, the U.S. Supreme Court has emphasized that even such compelling concerns are not sufficient to justify interference with the exercise of a fundamental right unless the means chosen for implementing those concerns are closely tailored to effectuate the ends. (See *Zablocki* v. *Redhail* (1978) 434 U.S. 374, 388 [98 S.Ct. 673, 54 L.Ed.2d 618; *Carey* v. *Population Services International, supra,* 431 U.S. 678 at p. 686.) It is therefore necessary to inquire whether the means selected by the State for protecting the welfare of the child in this case unconstitutionally infringes upon Stephen's fundamental right of reproductive choice.

C. ALTHOUGH THE STATUTORY GUIDELINE ON CHILD SUPPORT SERVE A COMPELLING STATE INTEREST IN PROTECTING THE WELL-BEING OF CHILDREN AND ENSURING THAT THEY DO NOT BECOME PUBLIC CHARGES, THE MEANS USED IN THIS CASE ARE NOT CLOSELY TAILORED TO ACHIEVE THOSE ENDS AND THEREFORE THE INFRINGEMENT OF STEPHEN'S REPRODUCTIVE FREEDOM CANNOT BE JUSTIFIED

When state laws significantly interfere with the exercise of a right as fundamental as whether to bear or beget a child, strict scrutiny is required and the legislation can be justified "only by compelling state interests." (*Carey* v. *Population Services International, supra,* 431 U.S. at p. 686.) The Statewide Uniform Guideline for Support is intended to achieve two principal interests: (1) "to place the interests of children as the state's top priority" (Fam. Code § 4053, subd. (e)), and (2) to ensure as much as possible that the needs of children will be met through the parents' financial resources rather than by public assistance (*Id.,* subd. (h)). Although each of these state

interests is compelling, the means used to achieve them in this case are constitutionally deficient.

1. The Means Used to Achieve the State Interest in Providing for the Needs of the Child in This Case Do Not Bear a Fair and Substantial Relation to That End

Unquestionably, protecting the welfare of children and providing for their financial support upon the dissolution or annulment of a marriage are important and compelling state interests.[18] The issue is "whether the means used to achieve these ends are constitutionally defensible" (*Stanley* v. *Illinois* (1972) 405 U.S. 645, 652, [92 S.Ct. 1208, 31 L.Ed.2d 551]).

The means used to accomplish a legislative purpose must bear "a fair and substantial relation to the object of the legislation." (*Zablocki* v. *Redhail, supra,* 434 U.S. at p. 402 [Powell, J., concurring] [quoting from *Craig* v. *Boren* (1976) 429 U.S. 190, 211 (97 S.Ct. 541, 50 L.Ed.2d 397) (Powell, J., concurring)]; emphasis added.) When a man engages in sexual intercourse with a woman, responsibility for the support of a resulting child is fairly imposed on the theory that it is reasonably foreseeable that the woman will become pregnant and bear a child. (See *Stephen K.* v. *Roni L., supra,* 105 Cal.App.3d at p. 645; *Dorsey* v. *English* (1978) 283 Md. 522, 390 A.2d 1133). To hold Stephen responsible for conceiving

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[18]No constitutional right of the child is raised by the facts of this case. A child has no constitutional right to state-mandated child support. (*DaShaney* v. *Winnebago County Dept. of Social Services* (1989) 489 U.S. 189 [109 S.Ct. 998, 103 L.Ed.2d 249].) The Due Process Clause, according to the Supreme Court, "confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." (489 U.S. at p. 196.)

Pame- la's child when he practiced abstinence, the only form of birth control that is uniformly regarded as 100 per cent effective, is to hold him to a standard of liability without fault. Such an irrational standard of personal responsibility offends traditional Anglo- American conceptions of justice. (See O.W. Holmes, *The Common Law* (1881) 96.) The only way Stephen could have protected himself from Pamela's treachery would have been to refrain not only from sexual intercourse with his wife, but from sexual activity of any kind. For a man to be so constrained within the marital relationship — the only legal sanctuary for sexual relations in our society — would be to submit to a form of sexual totalitarianism unprecedented in American constitutional jurisprudence. Men do not lose their constitutionally protected right not to have children when they marry, especially when, as here, the wife has used the marital relationship as a sexual confidence game.

While marriage ordinarily implies an agreement to support the children produced by the marriage (see *Stanley* v. *Illinois*, supra, 405 U.S. at p. 663), Stephen's marriage was expressly conditioned on Pamela's agreement not to have children, the breach of which provided the basis for the annulment granted to Stephen. Imposing a child support obligation on a man in the absence of an express or implied promise, foreseeable risk, or any other rational theory of fault is "so offensive to our shared notions of fairness" in allocating personal responsibility that it "offends the Due Process Clause of the Fourteenth Amendment." (*Zablocki* v. *Redhail, supra,* 434 U.S. at p. 395 [Stewart, J., concurring]).

2. The Means Used to Achieve the State interest in Ensuring that Children Do Not Become Public Charges Are Overinclusive As Applied to this Case

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The second justification for the statutory support guideline is to prevent the children of divorced parents or of parents who

have obtained an annulment from becoming dependent on public assistance. (Fam. Code § 4053, subd. (h).) This interest is undoubtedly a legitimate and compelling concern of the state. However, the facts deemed to be true for purposes of the proceeding below do not indicate that Pamela and her child are currently receiving any form of public assistance and the possibility that they may become dependent on public assistance if Stephen is not required to make support payments is far too speculative to uphold the support order on this ground alone. (Cf. *Hecht* v. *Superior Court, supra,* 16 Cal.App.4th at p. 860). Moreover, even if the mere possibility of the child becoming a public charge is sufficient to constitute a compelling state interest, it does not follow that it justifies the deprivation of Stephen's fundamental right to reproductive choice. If the means chosen to achieve that interest are either overinclusive or underinclusive with respect to the litigant challenging the statutory scheme, the legislation cannot constitutionally be applied to him. (See *Zablocki* v. *Redhail, supra,* 434 U.S. at p. 390.)

The constitutionality of a state statute designed to ensure that the children of divorced parents do not become public charges was considered by the U.S. Supreme Court in *Zablocki* v. *Redhail, supra,* 434 U.S. 374. *Zablocki* dealt with a Wisconsin law which provided that any resident having minor children not in his custody and which he was under an obligation to support by court order could not marry without first obtaining court approval. Under the statute, court permission required proof that the applicant's support obligation had been met and that children covered by the support order "are not then and are not likely thereafter to become public charges." (434 U.S. at p. 375.) The court accepted "for present purposes" that the asserted state interest in ensuring that out-of-custody children do not become public charges was "legitimate and substantial" (434 U.S. at p. 388), but concluded that the means used by the state was both underinclusive and overinclusive (434 U.S. at p. 390). For this

reason, the Wisconsin law was struck down as an unconstitutional infringement of the fundamental right to marry protected by the Due Process Clause of the Fourteenth Amendment.

For reasons of overinclusiveness, Family Code sections 4050, et seq., although facially constitutional, are unconstitutional as applied to the unique facts presented by this appeal. In assessing the constitutionality of the statutory support guideline as applied to Stephen, the guideline cannot be considered in a vacuum. Since the Legislature has established separate standards for determining liability for the support of children conceived by artificial insemination (Fam. Code § 7613), and Pamela's child was conceived by artificial insemination, the two statutory provisions must be considered together in evaluating the constitutionality of the support order issued below.

Family Code section 7613, which was initially enacted as Civil Code section 7005 in 1975 (Stats. 1975, ch. 1244, § 11), and derived from the Uniform Parentage Act (9A West's Uniform Laws Ann. (1979) Parentage Act, p. 593), provides in pertinent part: "(a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived . . . . [¶] (b) The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived."

Unlike the Uniform Parentage Act, which restricts application of its provisions to married couples (9A West's Uniform Laws Ann., *op. cit. supra,* § 5, subd. (b), p. 593), Family Code section 7513, subdivision (b) applies to all women, married or single. The purpose of this expansion of coverage is to allow an unmarried woman to conceive and bear a child without sexual intercourse and without fear that the

donor may claim the rights of parenthood. (See *Jhordan C.* v. *Mary K., supra,* 179 Cal.App.3d at p. 392.) The biological father is exempted from liability for child support even though the unmarried donee may become dependent on public assistance because her income is insufficient to support her child.[19] (See *Id.* at p. 398, fn. 10 [a judgment ordering reimbursement from a biological father for AFDC payments by the county is extinguished by a subsequent judgment declaring that the father is covered by the statutory exemption, citing Welf. & Inst. Code § 11350.1].)

Moreover, unless he consents to the procedure, the husband of a mother artificially inseminated by sperm from a third-party donor is not liable for the support of a resulting child (Fam. Code § 7613, subd. (a)), even if the husband's failure to provide support will result in the child becoming a public charge (*Jhordan C.* v. *Mary K., supra,* 179 Cal.App.3d at p. 398, fn. 10). Thus, the Legislature has established two important exceptions to the policy of preventing a child from becoming dependent on public assistance when the child is conceived by artificial insemination: a child can be denied support from (1) the biological father of the child when he is a third-party donor, or from (2) the non-consenting husband of the child's mother when the husband is not the donor. With respect to both exceptions, the critical factor is the intent of the man not to assume the obligations of fatherhood. In the case of the third-party donor, the intent is presumed by the statute. (See *McIntyre* v. *Crouch* (1989) 98 Ore. App. 462, 473, 780 P.2d 239, 246 (concurring opinion) [construing statute similar to Fam. Code § 7613].) In the case of the husband who is not the donor, it is the husband's actual intent that governs. (See *People* v. *Sorenson* (1968) 68 Cal.2d 280, 285 [requiring that the husband "actively participates and consents" to his wife's

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[19]A sperm donor qualifies for this exemption only if the insemination is supervised by a licensed physician. (Fam. Code § 7613, subd. (a)).

insemination (announcing standard prior to enactment of Fam. Code § 7613)].)

The enactment of California's artificial insemination statute, in addition to enhancing the ability of infertile couples and unmarried woman to have children, has important legal implications for the concept of fatherhood. By separating fatherhood from a biological nexus, the statute, in effect, profoundly transforms the legal concept of fatherhood. When conception is accomplished without sexual intercourse, Family Code section 7613 moves beyond a biological standard of fatherhood to a standard of procreative intent. What makes a man a father under the statute is no longer the existence of a biological link with the child, but rather the *intent* to assume the obligations of fatherhood. Even when Family Code section 7613 is inapplicable because a licensed physician has not been used, the intent of the parties has been held to ultimately govern the determination of fatherhood, at least when the donor is asserting a claim to parental *rights*. (*Jhordan C.* v. *Mary K., supra,* 179 Cal.App.3d at p. 398 ["[B]ecause the parties by all other conduct preserved [the donor's] status as a member of [the child's] family, the trial court properly declared [the donor] to be [the child's] legal father."]; see generally Annot., supra, 83 A.L.R.4th 295, § 2a [in the absence of a governing statute, courts have generally resorted to effectuation of the intent of the parties to decide contested issues involving parental rights and obligations in connection with artificial insemination].)

As applied to Stephen, then, Family Code section 7613, the exemption statute, is underinclusive, while sections 4050 et seq., the support guidelines, are overinclusive. Insofar as the exemptions from child support carved out by Family Code section 7613 were intended to relieve a semen donor or a husband or parental obligations when there is either a presumptive or actual lack of consent to fatherhood in cases or artificial insemination, the failure of the statute to exempt a person in Stephen's situation — an involuntary donor and a non-

consenting husband — makes the statute underinclusive. Requiring Stephen to pay child support when other men similarly situated are exempted by section 7613 from supporting a child even though the exemption will result in the child becoming a public charge is fundamentally unfair. Therefore, the child support provisions of Family Code sections 4050, et seq., when viewed in light of the exemptions created by section 7613 for similarly situated men, are overinclusive as applied to Stephen. The failure of the trial court to exempt Stephen from the support obligations of Family Code sections 4050, et seq., thus cannot be justified by the state interest in preventing Pamela's child from becoming a public charge. Accordingly, the finding of the trial court that "Stephen's lack of consent in the manner alleged in the stipulated facts does not relieve him of the obligation of child support (App. 109, ¶ 6) deprived Stephen of his fundamental right of reproductive choice.

D. THE CONCLUSIVE PRESUMPTION CREATED BY FAMILY CODE SECTION 7540, INSOFAR AS IT IS CONSTRUED TO PREVENT STEPHEN FROM ESTABLISHING THAT HE IS NOT BOUND BY THE LEGAL OBLIGATIONS OF FATHERHOOD, IS UNCONSTITUTIONAL AS APPLIED

Family Code section 7540 creates a conclusive presumption, absent exceptions not relevant to this appeal, that "the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." No question is raised by this appeal regarding Stephen's status as the child's biological father.[20] Stephen

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[20]Stephen initially challenged his paternity pursuant to the statutory exception permitting a husband to contest the presumption of paternity with blood tests. (Fam. Code § 7541, subds. (a), (b).) Blood tests showed that Stephen is the biological father of the child. (9/28/93 Dec. 2; App. 102.)

contends, however, that application of the conclusive presumption of section 7540 to preclude him from denying liability for child support would infringe his constitutional right of reproductive choice.

A conclusive presumption is unconstitutional if (1) it burdens a fundamental freedom, and (2) there is lacking the necessary closeness of fit between the ends served by the presumption and the means used to achieve those ends. (See *Michael H.* v. *Gerald D., supra,* 491 U.S. 110, at p. 122 [a constitutional challenge to the conclusive presumption created by Fam. Code § 7540 calls for a "fundamental rights" analysis].) Since the presumption, as applied to the facts here, interferes with a fundamental right to procreative freedom (see Argument III.A., supra), it remains to inquire whether there is a sufficiently close relationship in this case between legislative means and ends.

The conclusive presumption created by section 7540 serves three important state interests: (1) to preserve the integrity of the family unit; (2) to protect children from the legal and social stigma of illegitimacy; and (3) to promote individual rather than state responsibility for child support. (*Alicia R.* v. *Timothy M., supra,* 29 Cal.App.4th 1242, 1237.) With respect to the interest in preserving the integrity of the marriage, the legislative aim is to "afford . . . protection to husband and wife from any claim of paternity by an *outsider*" (*Jhordan C.* v. *Mary K., supra,* at p. 395; emphasis added). Since the claim asserted here is being made by the husband rather than an "outsider," and the husband is not claiming that the child resulted from an extramarital relationship, there is no threat to the integrity of the former marriage. Application of the presumption thus fails to serve any interest in marital or family integrity.

As for the state interest in protecting children from the

stigma of illegitimacy, a child is not illegitimate unless conceived in an extra-marital relationship. (See *Michael H.* v. *Gerald D., supra,* 491 U.S. 110 at pp. 161-162 [White, J., dissenting].) Since there is no assertion here that the child was conceived out of wedlock, application of the presumption of fatherhood does not further the interest in protecting the child from being stigmatized as illegitimate.

Finally, the state interest in promoting individual rather than state responsibility for child support, while certainly compelling, cannot justify application of the presumption of legal fatherhood in the circumstances of this case. Taking the first prong, individual responsibility, first: Using the conclusive presumption created by Family Code section 7540 to allocate personal responsibility to Stephen fails for the same reason that the Uniform Statewide Support Guideline, sections 4050, et seq., cannot be applied to Stephen for the purpose of achieving the state interest in protecting the welfare of the child. (See subsection C (1), supra at pp. 36-39.) There must be a "fair and substantial" basis for allocating parental responsibility to a particular person. (*Zablocki* v. *Redhail, supra,* 434 U.S. 474, at p. 402 [Powell, J., concurring]; see subsection C (1), *supra,* at pp. 36-39.) To hold Stephen responsible for parental support when he practiced the most effective form of birth control — abstinence from intercourse — and when his semen was obtained by fraud, is to hold him to a standard of liability without fault. Imposing a child support obligation on a man under these circumstances is "so offensive to our shared notions of fairness [as to] offend . . . the Due Process Clause of the Fourteenth Amendment" (*Zablocki* v. *Redhail, supra,* 434 U.S. at p. 402 [Powell, J., concurring].)

Nor can the interest in avoiding state responsibility for the child justify application of the presumption. That justification fails for the same reason that application of the Uniform Statewide Support Guideline (Fam. Code § 4050, et seq.) cannot be justified by the state interest in preventing children from becoming public charges (see subsection C (2), *supra,* pp.

39-46). The challenged presumption is overinclusive as applied to Stephen, since other biological fathers are exempted from the legal obligations of fatherhood even though their biological offspring may become public charges (see Family Code § 7613, subd. (b); *Jhordan C.* v. *Mary K., supra,* 179 Cal.App.3d 386, 398, fn. 10).

The statutory presumption created by Family Code section 7540, as applied in these circumstances, thus cannot be justified by any of the interests advanced in support of it. Consequently, application of the presumption would unconstitutionally burden Stephen's fundamental right of procreative choice.

CONCLUSION

For the foregoing reasons, the Order After Hearing should be reversed and the cause remanded to the trial court.

DATED: March 24, 1995 (original filed December 23, 1994)

APPENDIX VII.
EXCERPT FROM SUPPLEMENTAL LETTER BRIEF TO CALIFORNIA COURT OF APPEAL (filed November 22, 1995)

November 21, 1995

Ron D. Barrow, Clerk
Court of Appeal, Div. 4
303 2d St., Ste. 600
San Francisco, CA 94107

Re: Pamela N. v. Stephen M., No. A066566
Supplemental Letter Brief Following Argument

Dear Mr. Barrow:

At argument on the above-referenced cause, the court granted appellant permission to file a supplemental brief regarding to issues discussed during argument. This is that brief.

II. THE OVERWHELMING WEIGHT OF AUTHORITY IS THAT WHEN A NEW THEORY IS PRESENTED FOR THE FIRST TIME ON APPEAL, THE COURT WILL ENTERTAIN IT IF IT PRESENTED PURELY AS A MATTER OF LAW ON UNDISPUTED FACTS

A. THIS CASE COMES TO THIS COURT ON UNDISPUTED FACTS SOLELY AS A QUESTION OF LAW

Prior to a discussion of the law, it is vital to remember that the issues raised in appellant's brief come to the court as pure issues of law, because the factual hearing was precluded below.

First, in the initial hearing on the motion to terminate child support, the court and the parties agreed that the legal issue

would be decided first (12/14/93 RT 4-6). Second, at the continued hearing, the argument began with the court agreeing with counsel that that hearing was to determine the question of law "assuming all of the facts to be as put forth by [appellant]." (12/14/93 RT 3.) Third, at the end of the hearing, counsel put forth the question just decided as follows: "Is this court saying that okay, for today's hearing, I acknowledge the fact that she artificially inseminated herself; I acknowledge the fact that she did it without his knowledge or consent, but I, the court in this case, am saying that we don't need his consent with the fraudulent —" The court replied: "Yes, Mr. Doty. Yes, that's exactly what I am saying. That's exactly what I'm saying." (12/14/93 RT 15-16.) Finally, the courts Findings and Order After Hearing recite that,

> "At the December 7, 1993 hearing, the parties stipulated that the legal issues presented by Stephen's motions should be first resolved. It was therefore agreed that the matter would be put over to December 14, 1993 in order to determine whether Stephen is entitled to relief assuming that the allegations of his motions are proven to be true. At the hearing on December 143, 1993, the matter proceeded *assuming all facts put forth by Stephen to be true.* Counsel for both parties were given an opportunity to argue the matter and *it was submitted on that basis.*"
>
> The court makes the following findings:
>
> 1. For purposes of this ruling, *the facts set forth above and in Stephen's motion are deemed to be true.*" (Appellant's Appendix 108-109; emphases added.)

In this setting, when the court below has found as a fact that the parties stipulated to presenting the legal arguments and only thereafter the facts if they were relevant, it would be fundamentally unfair to fault appellant for any failure to present facts. This is a crucial point because the cases discussed below consistently hold that where there has been no presentation of facts below and only a question of law is presented, the

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appellate court decides that question even if it is first presented on appeal.

In this case, then, there has been no factual hearing by agreement of the parties and the court. Moreover, the facts to be presented are in no way affected by the law to be applied--the only factual question that was to be litigated if the court had ruled in Stephen's favor on the law was whether or not his version of the facts was true, and this would have been true no matter what legal theory had been presented to the court. Thus, although the court was prevented from ruling on this *issue of law,* that is true in all of the cases presented below in which a legal theory was presented for the first time on appeal and decided. And in contrast to the cases in which the new legal theory was not decided, there is here no disputed issue of fact, there was no factual hearing, and no facts ruled upon and no theory asserted which are inconsistent with the theories presented for the first time on appeal.

B. THE OVERWHELMING WEIGHT OF AUTHORITY IS THAT WHERE THERE HAS NOT BEEN A FACTUAL HEARING AND THE NEW THEORY IS A PURE QUESTION OF LAW, THE APPELLATE COURT WILL HEAR THE ISSUE

On the issue of whether an appellate court should or must consider an issue of law raised for the first time on appeal, appellant has reviewed cases spanning the past twenty years, as well as many of the earlier cases cited therein. The results of this review are overwhelmingly on the side of consideration of the issue. Indeed, appellant has found only one case, discussed below and distinguishable from this one, in which a pure question of law was presented and not decided by the appellate court. In contrast, *all* of the other cases either (1) support appellant's position because courts consider pure question of law; or (2) are distinguishable because (a) the facts on which the theory depend were not presented or resolved below; or (b)

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the theory is inconsistent or opposed to the theory on which the case was decided below. The cases are set forth below.

Initially, it should be noted that all of the cases, or the cases cited by them, flow from two cases decided by the California Supreme Court. In *Panopulos* v. *Maderis* (1956) 47 Cal.2d 337, 340-341, the court held that "when as here the facts with reference to the contention newly made on appeal appear to be undisputed and that probably no different showing could be made on a new trial it is *deemed appropriate* to entertain the contention as a question of law on the undisputed facts and pass on it accordingly." (Id. at p. 341.) Unfortunately, prior to reaching this ruling, the court reviewed prior cases and restated such prior law as that "[I]f a question of law only is presented on the facts appearing in the record the change in theory *may* be permitted. (Citation.)" (*Ibid.*) Discussion of the cases which have used the underscored "may" to find discretion to decide even when only a pure question of law is presented appears below. It should be noted, however, that the "may" langauge is later eschewed by the Supreme Court when it said, as quoted above, that consideration of the pure question of law is "deemed appropriate." Two years later, in *Ward* v. *Taggert* (1959) 51 Cal.2d 736, the Supreme Court adopted even firmer langauge in favor of deciding pure questions of law:

> "Although this theory of recovery was not advanced by plaintiffs in the trial court, it is *settled* that a change in theory *is permitted* on appeal when 'a question of law only is presented on the facts appearing in the record. . . ." [Citations.] The general rule confining the parties upon appeal to the theory advanced below is based on the rationale that the opposing party should not be required to defend for the first time on appeal against a new theory that 'contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial.' (Citation.) Such is not the case here." (51 Cal.2d at p. 742; emphases added.)

Thus, after *Ward,* while the general rule of waiver applied

when there were facts presented below but not resolved with regard to the new theory, it was "*settled*" that a new theory *"is permitted*" when the theory presents only a question of law on the facts appearing in the record. If it is settled that presentation of a new theory is permitted, then the appellate no longer has discretion not to entertain it. If that is not crystal clear from the langauge of *Ward,* it has become so in the clear dichotomy of subsequent cases.

The dichotomy is as follows: with the sole exception of *Bihan,* discussed *supra,* **all** of the cases which presented solely a question of law, or on which the facts below were undisputed, led to appellate consideration of the new theory presented on appeal. (*Xiloj-Itzep* v. *City of Agoura Hills* (1994) 24 Cal.App.4th 620, 633 [citing *Ward]; Sanchez* v. *Truck Ins. Exchange* (1994) 21 Cal.App.4th 1778, 1787 [where question of law, appellant *"may change*" theory on appeal], citing *B & P Development Corp.* v. *City of Saratoga* (1986) 185 Cal.App.3d 949, 959 [new theory may be presented on appeal of sustaining of demurrer, which raises only questions of law]; *Sylve* v. *Riley* (1993) 15 Cal.App.4th 23, 26, fn. 1 [no waiver when there is no significant difference between theory presented below and theory presented on appeal]; *American Western Banker* v. *Price Waterhouse* (1993) 12 Cal.App.4th 39, 52-53 [nothing respondents could have shown on motion to dismiss for failure to prosecute prevents allegations based on new theory presented on appeal]; *Resolution Trust Corp.* v. *Winslow* (1992) 9 Cal.App.4th 1799, 1809 [waiver rule does not apply when facts are not disputed and new question of law raised]; *Cislaw* v. *Southland Corp.* (1992) 4 Cal.App.4th 1284, 1297-1298 [although theory not raised below, proof supporting it was same as proof supporting theory that was raised below]; *Susan A.* v. *County of Sonoma* (1991) 2 Cal.App.4th 83, 93, fn. 4 [pure question of law, *Panopulos* "may" cited, new theory decided]; *Peterson Development Co.* v. *Torrey Pines Bank* (1991) 233 Cal.App.3d 103, 117, fn. 11 [new theory decided because facts clearly put in issue below and undisputed on

appeal]; *County of Sonoma* v. *Rex* (1991) 231 Cal.App.3d 1289, 1297, fn. 3; *In re Marriage of Hinds* (1988) 205 Cal.App.3d 1398, 1403 [waiver rule relaxed for important issue of public policy]; *Seeley* v. *Seymour* (1987) 190 Cal.App.3d 844, 856 (de novo interpretation of document and application of it to undisputed facts] *State of California* ex rel. *Public Works Bd.* v. *Bragg* (1986) 183 Cal.App.3d 1018, 1023-1024 [no waiver where issue raises pure question of law such as the interpretation and applicability of a statute]; *In re Marriage of Becker* (1984) 161 Cal.App.3d 65, 75, fn. 3 [change in theory permitted for pure question of law on facts appearing in the record]; *Mission Ins. Co.* v. *Hartford Ins. Co.* (1984) 155 Cal.App.3d 1199, 1211 [pure question of law]; *City of Merced* v. *State of California* (1984) 153 Cal.App.3d 777, 780-781 [pure question of law]; *Martin* v. *Kehl* (1983) 145 Cal.App.3d 228, 239 [even if facts presented below where insufficient to support theory presented there, they are sufficient to support new theory, which raises only question of law]; *Jimenez* v. *City of Oxnard* (1982) 134 Cal.App.3d 856, 859 [undisputed facts; merely issue of law], *citing Frink* v. *Prod* (1982) 31 Cal.3d 166, 170, *Ward* v. *Taggert,* supra, Powell v. *Premier Insurance Co.* (1981) 118 Cal.App.3d 335, 345 [rule does not apply when the facts are undisputed and the party merely raised a new question of law]; *Molina* v. *Retail Clerks Unions etc. Benefit Fund* (1980) 111 Cal.App.3d 872, 878 [facts not disputed]; *Barton* v. *Owen* (1977) 71 Cal.App.3d 484, 491 [pure issue of law]). This case, of course, is such a case: the issue presented is one purely of law.

In contrast are the cases in which there was a trial or some other presentation of facts and the facts relating to the issue raised on appeal were either not presented or remain in dispute (*Western Oil & Gas Assn.* v. *Monterey Bay Unified Air Pollution Control Dist.* (1989) 49 Cal.3d 408, 427, fn. 20, *citing Phillippe* v. *Shapell Industries* (1987) 43 Cal.3d 1247, 1256 [where case tried on theory that appellant was entitled to broker's commission, he may not now raise inconsistent claim

that he was not acting as a broker], *citing Bogaki* v. *Board of Supervisors* (1971) 5 Cal.3d 771, 780 [general rule of waiver "stringently applied when the new theory depends on controverted factual questions whose relevance thereto was not made to appear at trial]; *Moerman* v. *State of California* (1993) 17 Cal.App.4th 452, 460 [theory not factually presented to trial court cannot create a triable issue, or be considered on appeal], citing *Rickel* v. *Schwinn Bicycle Co.* (1983) 144 Cal.App.3d 648, 655 [relevant factual situation not brought sufficiently into controversy below]; *Asbestos Claims Facility* v. *Berry & Berry* (1990) 219 Cal.App.3d 9, 26-27 [factual questions on which new theory depends not resolved below]; *In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 501 [question of fact crucial to new theory was neither raised nor developed in proceeding below]; *First Interstate Bank* v. *State of California* (1987) [appellant's new theory not supported by facts presented at trial]; *Richmond* v. *Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 879 [defendant not reasonably put on notice to present all its evidence below regarding asserted new theory]; *Hennifer* v. *Butcher* (1986) 182 Cal.App.3d 492, 505-506 [new theory required accounting, a factual issue not decided below]; *Dowell* v. *County of Contra Costa* (1985) 173 Cal.App.3d 896, 902 [doctrine of equitable tolling not raised on demurrer and motion for summary judgment, so court below had no opportunity to rule on its applicability to case], citing *Sierra Club, Inc.* v. *California Coastal Com.* (1979) 95 Cal.App.3d 495, 503 [same], citing *People* v. *Pacific Employers Ins. Co.* (1973) 36 Cal.App.3d 296, 301 [factual basis for new claim not presented to trial court]; *Bank of America* v. *Cory* (1985) 164 Cal.App.3d 66, 78, fn. 4 [amicus raises question not raised nor considered at trial]; *Guardians of Turlock's Integrity* v. *Turlock City Council* (1983) 149 Cal.App.3d 584, 599 [theory not raised at trial], citing *Ernst* v. *Searle* (1993) 218 Cal. 233, 240-241 [new contention contrary to facts and theory upon which case was tried]; *Walter H. Leimert Co.* v. *California Coastal Com.* (1983) 149 Cal.App.3d

222 [while argument raised and presented below, it was not specifically directed to issue raised in court of appeal], citing *Estate of Westerman* (1968) 68 Cal.2d 267, 278-279 [plaintiff did not at trial present facts supporting new theory]; *Muffett* v. *Royster* (1983) 147 Cal.App.3d 289, 300 [facts not disputed]; *Adelson* v. *Hertz Rent-A-Car* (1982) 133 Cal.App.3d 221, 225-226 [new theory contemplates a factual situation, the consequences of which are open to controversy]; *Canal-Randolph Anaheim, Inc.* v. *J.E. Wilkoski* (1980) 103 Cal.App.3d 282, 289, fn. 5 [facts open to controversy and not put in issue or presented at trial], citing *Panapulos, supra,* and *City of Newport Beach* v. *Sasse* (1970) 9 Cal.App.3d 803, 812 [new theory involves legal and factual questions open to controversy and not presented at trial]; *Trammell* v. *Western Union Tel. Co.* (1976) 57 Cal.App.3d 538, 555 [theory was not basis upon which cause of action was founded, nor was it the standard upon which jury was instructed]). In this case, of course, the matter comes to the court without their having been a factual hearing or resolution of the facts because of the trial court's pre-briefing decision not to hear them.

A similar result was reached in the also-distinguishable cases in which the theory on appeal was inconsistent with the theory on which facts were presented and decided-upon below *(Bihun* v. *AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 988 [theory on appeal is directly contrary to position at trial and contradicts claim below that evidence there presented was relevant]; *Estate of Stevenson* (1992) 11 Cal.App.4th 852, 864 [case was tried on different theory and no evidence regarding this theory was presented at trial]; *Swicegood* v. *Rush* (1986) 178 Cal.App.3d 119, 127-128 [theory not supported by facts presented below]; *Walter E. Heller Western, Inc.* v. *Bloxham* (1985) 176 Cal.App.3d 266, 274; *Wright* v. *Goleta Water Dist.* (1985) 174 Cal.App.3d 74, 91-92 [inconsistent theory than presented at trial], citing *Signal Hill Aviation Co.* v. Stroppe (1979) 96 Cal.App.3d 627, 638 [facts presented at trial inconsistent with new theory on

appeal]; *Ward* v. *Levin* (1984) 161 Cal.App.3d 1026, 1032 [facts supporting new theory inconsistent with facts argued below]; *Hilliard* v. *A.H. Robins Co.* (1983) 148 Cal.App.3d 374, 392 [where both parties try case under one theory, new theory may not be presented on appeal]). It bears repeating that in this case, in contrast, there were no facts presented on any theory because the court adopted Stephen's facts as undisputed for the purpose of rendering her decision on the motion to terminate support.

Finally, as noted above, the troublesome "may" from *Panopulos* was not recognized as having been been erased by the "is permitted" language of *Ward*. Nevertheless, all of the cases in which the appellate court was said to have discretion, even over pure law questions, either ended up deciding the question or cited as authority cases which decided the question (*Canaan* v. *Abdelnour* (1985) 40 Cal.3d 703, 722 [point decided as one aspect of larger constitutional question, despite having been raised for first time at oral argument, based on appellate court's discretion not to apply waiver rule], citing *Bayside Timber Co.* v. *Board of Supervisors* (1971) 20 Cal.App.3d 1, 5 [after discussion of reasons for bypassing general rule of waiver, including statement of discretion of appellate court, court notes that as question is one of law only, there is no prejudice to respondents in considering it]; *Palmer* v. *Shawback* (1993) 17 Cal.App.4th 296, 300 [court may consider new theory when it involves purely question of law, and did]; *North Coast Business Park* v. *Nielsen Construction Co* (1993) 17 Cal.App.4th 22, 29 [matter was resolved on summery judgment below on inconsistent theory], citing *Ernst* v. *Searle* (1993) 218 Cal. 233, 240-241 [new contention contrary to facts and theory upon which case was tried]; *Fields* v. *Blue Shield of California* (1985) 163 Cal.App.3d 570, 585 [cites "may" from *Panopulos;* decides issue on undisputed facts]).

The single exception mention above, in which a pure question of law was presented but not reached by the appellate

court, was *Bihun* v. *AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 999-1001. That case is distinquishable because the issue arose from a case decided while the appeal was pending, and the court also carefully analyzed and found inapplicable the other reasons for reaching a late-raised issue. The clear dichotomy presented by all of the other cases was followed by this division in *Superior Motels, Inc.* v. *Rinn Motor Hotels, Inc* (1987) 195 Cal.App.3d 1932, in which constrasting results were reached. Where the new theory involved uncontradicted evidence presented at trial, the new theory was entertained (*Id.*at p. 1055, fn 13). On another point, however, the new theory was not entertained because no evidence was introduced relative to it at trial, and no factual ruling was made (*Id.* at pp. 1059-1060). Similarly, in *Redevelopment Agency* v. *City of Berkeley* (1978) 80 Cal.App.3d 158, this division considered a new theory raised on appeal which presented solely a question of law (*Id.* at pp. 166-167, citing *Isthmian Lines, Inc.* v. *Schirmer Stevedoring Co.* (1967) 255 Cal.App.2d 607, 610 [pre-Ward case in which court exercised discretion to decide issue because it will be important following remand on other grounds].

It cannot be repeated often enough, that this case presents a pure question of law, on facts which were undisputed because the court refused to hear and resolve them, and this falls directly within the *Ward* line of cases, followed consistently with one distinguishable exception, in which the appellate court did entertain the new theory. In contrast, because there was no opportunity to present the factual dispute below, and they were thus undisputed, the case is distinguishable from *all* of the cases in which a factual dispute was, at the party's instance, was not presented below, was inconsistent with the facts or theory presented below, or which depended on unresolved factual questions. The theories presented in this appeal do not depend on resolution of the factual issues; rather, the factual ruling below (or whether it is even reached) depends entirely on how this court rules on the issues of law presented.

C. IT IS ARGUABLE THAT A CONSTITUTIONAL QUESTION RAISING FUNDAMENTAL RIGHTS MAY NOT BE WAIVED BY FAILURE TO RAISE IT BELOW

An unresolved question is whether a question of fundamental constitutional rights can ever be waived below. (*In re Andre P* (1991) 226 Cal.App.3d 1164, 1169-1170, and cases there cited, and in particular *State* v. *Williams* (1987) 205 Conn. 456 [appellate consideration is proper for claims that implicate fundamental constitutional rights and a fair trial, and are adequately supported by the record]. *Andre P.* did not decide the question, and we are unaware of a case which has. But this case raises it both because it raises a fundamental constitutional question and because the court found below that the parties had stipulated to the procedure under which no facts had been presented to it. As mentioned above, it would be fundamentally unfair to hold appellant responsible for not presenting the facts to the court, and as the monumental weight of authority states, including that of the California Supreme Court which this court must follow under *Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455, where there has been no presentation of facts and no presentation of inconsistent facts or theories, and a new theory is presented to the appellate court purely as a matter of law, it will be entertained. To do otherwise would twice violate constitutional rights, first of procreational choice, and second of due process under the Fourteenth Amendment.

Respectfully Submitted,

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APPENDIX VIII:
EXCERPT FROM PETITION FOR REHEARING TO THE CALIFORNIA COURT OF APPEAL (Filed December 15, 1995)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

PAMELA N.,	)	No. A066566
	)	
Petitioner and Respondent,	)	Marin County
	)	Superior Court
	)	No. FL 4271
vs.	)	
	)	
STEPHEN M.,	)	
	)	
Respondent and Appellant.	)	

PETITION FOR REHEARING

ARGUMENT

I. THE CALIFORNIA SUPREME COURT CASE RELIED ON BY THIS COURT TO JUSTIFY ITS FINDING OF WAIVER OF THE CONSTITUTIONAL ISSUES HAS BEEN SUPERSEDED BY SUBSEQUENT SUPREME COURT CASES WHICH HAVE BEEN FOLLOWED IN INNUMERABLE COURT OF APPEAL OPINIONS

In finding that the failure to raise the constitutional issues regarding Stephen's right to procreative choice waived, this court cited *Ernst* v. *Searle* (1933) 218 Cal. 233, 240-241. In doing so, the court appears to have ignored, in violation of *Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455, more recent pronouncements of our Supreme Court. In two cases decided more than twenty years after *Ernst,* the Supreme Court made clear an exception to the general rule of waiver when only a question of law was presented to the reviewing court *(Ward* v. *Taggert* (1959) 51 Cal.2d 736, 742 ["it is settled that a change in theory in permitted on appeal when 'a question of law only is presented"]; *Panopulos* v. *Maderis* (1956) 47 Cal.2d 337, 340-341).

Moreover, as set forth in appellant's post-oral-argument supplemental letter brief, filed Nov. 21, 1995 [hereinafter, "Supplemental Letter Brief"], in the past twenty years, twenty-two cases have followed *Panopulos* and *Ward* in reaching pure questions of law not raised below, while only one distinguishable case has not. In contrast, *all* of the cases which declined to reach the new issue raised on review involved a trial or other factual hearing and a new theory which was based on facts either not presented below or contradicted by the

appellant's facts presented below.[1]

Even Witkin agrees, in a section four pages beyond that cited by this court in its Opinion (at p. 5), although his language, "may be permitted to change his theory" reflects only the *Panopulos* language and not the more clearly permissive *Ward* language nor the clear trend of the cases since then (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 323, pp. 333-334; see cases cited in Supp. Letter Brief, at pp. 6-8).

This case clearly falls within the *Panopulos-Ward* exception: appellant's facts were deemed true by the trial court for purposes of denying the motion for termination of support. Accordingly, appellant respectfully requests that this court grant a rehearing and reconsider its finding of waiver in light of the cases cited in his supplemental letter brief.

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[1]Appellant is puzzled at this court's seeming failure to take into account his supplemental letter brief. If the point discussed in the supplemental letter brief, at pp. 5-12, was not clearly enough made, appellant apologizes, and urges the court to consider carefully the cases cited therein and their import.

APPENDIX IX.
EXCERPT FROM PETITION FOR REVIEW TO CALIFORNIA SUPREME COURT
(filed January 9, 1996)

IN THE SUPREME COURT OF CALIFORNIA

PAMELA N.,	)	No. ___
	)	
Petitioner and Respondent,	)	Court of Appeal
	)	No. A066566
	)	
vs.	)	Marin County
	)	Superior Court
STEPHEN M.,	)	No. FL 4271
	)	
Respondent and Appellant.	)	

PETITION FOR REVIEW

ISSUES PRESENTED FOR REVIEW

1. Whether a Court of Appeal decision may apply a waiver rule in direct conflict with decisions of this court, as a bar to considering a federal constitutional question;

2. Whether the Court of Appeal, by applying a rule contrary to settled law to avoid a federal constitutional question, has thereby discriminated against a constitutional claim in violation of the Supremacy and the Equal Protection Clauses of the United States Constitution;

ARGUMENT

I. THE COURT OF APPEAL'S FINDING OF WAIVER OF APPELLANT'S CONSTITUTIONAL CLAIMS WAS DIRECTLY CONTRARY TO THIS COURT'S SETTLED PRECEDENT, SHOULD NOT BE COUNTENANCED, AND OF ITSELF DEPRIVES APPELLANT OF FEDERAL CONSTITUTIONAL RIGHTS

A THE FINDING OF WAIVER OF THE CONSTITUTIONAL ISSUE FOR FAILURE TO RAISE IT BELOW IS CONTRARY TO BOTH THIS COURT'S RULINGS AND THE OVERWHELMING WEIGHT OF AUTHORITY, AND VIOLATES APPELLANT'S RIGHT TO PROCEDURAL DUE PROCESS

The refusal of the Court of Appeal to consider Stephen's constitutional argument because it was not raised in the trial court is contrary to settled law established and reaffirmed by this court over the past 40 years.

The law in California is clear: "'[T]the rule [of waiver] does not apply when the facts are not disputed and the party merely raises a new question of law.'" (*Hittle* v. *Santa Barbara County Employees Retirement Association* (1985) 39 Cal.3d 374, 392, fn. 10, quoting from *UFITEC, S.A.* v. *Carter* (1977) 20 Cal.3d 238, 249, fn. 2, and *Burdette* v. *Rollefson Construction Co.* (1959) 52 Cal.2d 720, 725-726; see also comprehensive review of cases at Supp.Brf. 5-8.). The exception to the raise-or-waive rule was first recognized by this court in *Panopulos* v. *Maderis* (1956) 47 Cal.2d 337, 340-341 and solidified as settled law in *Ward* v. *Taggert, supra,* and *Burdette.*

The trial court ruling denying appellant's motion to terminate child support was explicitly made upon appellant's version of the facts. (App. 109.) Accordingly, the appeal is upon undisputed facts, and the constitutional claim of reproductive choice, made for the first time in the Court of Appeal, presented a pure question of law. This case thus falls squarely within the exception created by the *Panopulos-Ward-Burdette* line of cases.

The Court of Appeal, despite the overwhelming authority cited by appellant, ignored this court's statement in *Ward* that "it is *settled* that a change in theory is permitted on appeal when 'a question of law only is presented on the facts appearing in the record . . . .'" (47 Cal.2d at p. 742; emphasis added.) It is difficult, in view of appellant's efforts to bring these leading Supreme Court cases to the attention of the Court of Appeal — in his opening brief, in his supplemental letter brief following argument, and in his petition for rehearing — to understand that court's complete failure to even acknowledge, no less follow, these authoritative rulings. That is particularly true when doing so directly violates the rule requiring adherence to this court's precedent, as articulated in *Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455).[2]

The waiver ruling also created a violation of due process: While a state may not be required by the U.S. Constitution to provide appellate review (*McKane* v. *Durston* (1894) 153 U.S. 684 [14 S.Ct. 913, 38 L.Ed. 867]), once a state establishes a

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[2]The Court of Appeal also created a second procedural issue by its denial of appellant's request for publication despite the fact that the opinion appears to fall squarely within standards of rule 976. The court's state-law ruling that the insemination, because it occurred during sexual activity and without the involvement of a third person, was not artificial, was either a new rule of law or application of an existing rule in a significantly different way (rule 976(b)(1)). And the court's application of the waiver rule to appellant's constitutional claim clearly created an "apparent conflict in the law" (rule 976(b)(2)).

system of appellate courts, procedural due process prohibits the exercise of judicial review in an arbitrary or unreasonable manner (see *Griffin* v. *Illinois* (1956) 351 U.S. 12, 18 [76 S.Ct. 585, 100 L.Ed. 891]). Deciding cases without regard to the general rules and precedents established by a state's highest court is an example of arbitrary power, and arbitrary power, enforcing edicts to the injury of persons and property, is not law (*Hurtado* v. *California* (1884) 110 U.S. 516, 535-536 [45 S.Ct. 111, 28 L.Ed. 232]).

There is, of course, a path open to this court short of full review: a grant of review and retransfer to the Court of Appeal with directions that the court reconsider its waiver ruling in light of *Ward* v. *Taggert, supra,* and its progeny. Appellant respectfully requests that, at minimum, the court do so.

B. THE COURT OF APPEAL, BY APPLYING A RULE CONTRARY TO SETTLED LAW TO AVOID A CONSTITUTIONAL QUESTION, HAS THEREBY DISCRIMINATED AGAINST APPELLANT'S CONSTITUTIONAL CLAIM IN VIOLATION OF THE SUPREMACY AND EQUAL PROTECTION CLAUSES OF THE U.S. CONSTITUTION

A second and equally important question presented by this petition is whether the Court of Appeal, by applying a state procedural rule that is contrary to settled law, as declared by this court, discriminated against appellant's federal constitutional claim in violation of the Supremacy Clause of Article VI of the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment.

State courts, under the Supremacy Clause, are required to hear federal claims analogous to the state claims they entertain (see *Testa* v. *Katt* (1947) 330 U.S. 386 [67 S.Ct. 810, 91 L.Ed 967), and have the same duty as federal courts to adjudicate federal constitutional questions when properly presented (see *Martin* v. *Hunter's Lessee* (1816) 1 Wheat. 304). "State courts

may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims." (*Hathorn* v. *Lovorn* (1982) 457 U.S. 255, 263 [102 S.Ct. 2421, 75 L.Ed.2d 824].)

The question of when and how a failure to comply with a state procedural rule can preclude consideration of a federal constitutional question is itself a question governed by federal constitutional law. (*Henry* v. *Mississippi* (1965) 379 U.S. 443, 447 [85 S.Ct 564, 13 L.Ed.2d 408]; see *Johnson* v. *Mississippi* (1988) 486 U.S. 578, 587 [108 S.Ct. 1981, 100 L.Ed.2d 575] [state procedural rule is not adequate unless "strictly or regularly followed"]). "State courts may not discriminate against federal rights in the exercise of procedural discretion." (16 Wright, Miller & Cooper, Federal Practice and Procedure (1977) § 4026, p. 729.)

As set forth in detail in the foregoing section, the refusal by the Court of Appeal to consider petitioner's constitutional claim rested upon a procedural rule that has not been followed by this Court for 40 years. It is therefore inadequate to bar review of the federal constitutional question.

A state procedural ground, even when it is treated as discretionary,[3] is not adequate unless the procedural rule is "'strictly or regularly followed.'" (*Johnson* v. *Mississippi, supra,* 486 U.S. at p. 587, quoting from *Barr* v. *City of Columbia* (1964) 378 U.S. 146, 149 [84 S.Ct. 1734, 12 L.Ed.2d 766]; see *Hathorn* v. *Lovorn, supra,* 457 U.S. at p. 264.) There is no evidence that the procedural bar relied on by the Court of Appeal in this case has been consistently or

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[3]There are several Court of Appeal decisions that treat the pure-question-of-law exception to the raise-or-waive rule as discretionary rather than mandatory (e.g., *Sanchez* v. *Truck Ins. Exchange* (1994) 21 Cal.App.4th 1778, 1787; *Sylve* v. *Riley* (1993) 15 Cal.App.4th 23, 26, fn. 1; *Bihun* v. *AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976). Nevertheless, with the sole exception of *Bihun,* all of 21 other cases decided over the past twenty years and more, whether they treated the exception as mandatory or discretionary, decided the new theory on the merits. (See Supp.Brf. 3-12.)

regularly applied. Indeed, the overwhelming weight of California law is to the contrary. Thus, even if the pure-question-of-law exception is treated as discretionary, there is no adequate state ground barring review of the constitutional question of appellant's reproductive freedom.